IN THE

Supreme Court of the United States

No. 589. **October Term, 1944.**

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM D. DISSTON.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the Tax Court (R. 39-41) has not been reported. The opinion of the Circuit Court of Appeals (R. 46-53) is reported in 144 F. (2d) 115 (C. C. A. 3d, 1944).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1944 (R. 79). The petition for a writ of certiorari was filed on October 12, 1944, and was granted on February 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED.

(1) Whether gifts in trust for minors are gifts of present interests, the first $5,000 of which are excluded for gift tax purposes under Section 504 (b) of the Revenue Act of 1932.

(2) Whether the Commissioner in computing the 1937 and 1938 gift taxes may make adjustments in the computation of net gifts in the year 1936 after the statute of limitations has barred any redetermination or adjustment of the 1936 gift taxes.

SUMMARY OF ARGUMENT.

I.

The ruling of the court below that the gifts here involved are gifts of present interests and that the settlor is entitled to the specific exclusion rests upon the ground that the gifts of the minor beneficiaries vested immediately in enjoyment and were irrevocable, definite and not uncertain either as to the identity of the donees or the amount of the gifts. An examination of the Disston deeds of trust establishes that the trustees were legally obligated to immediately apply the income of the trusts for the support, maintenance and education of the minor beneficiaries. The direction to accumulate any income not so needed is without significance because it merely incorporates into the deed of trust the duty imposed by law upon *all* who are entrusted with property belonging to a minor.

The petitioner assumes that the trust in the instant case is a trust to accumulate income. This assumption is contrary to the actual facts. The distinction between the instant case and the decisions cited by petitioner is the distinction between (1) an absolute direction to support and educate the minor beneficiaries, and (2) a direction to support and educate *only if* the trustee in his uncontrolled discretion wants to support and educate the minor beneficiaries. In the instant situation the trustees are obligated to use the income for the support and education of the beneficiaries even though there may be other funds available for such purposes.

The deed of trust provides for the immediate application of the income for the minor's comfort, support and education and the corpus of the trust is not more than is reasonably sufficient to produce the income required and to insure its continued payment for these purposes. For this reason the entire gift is a gift of a present interest.

II.

Petitioner, having determined that the gifts for the minor children in 1936 were gifts of present interests, should not be permitted, after the Statute of Limitations has run, to reverse this determination so as to increase the gift taxes for subsequent years. Petitioner's interpretation would make it impossible for a donor or the government to determine the donor's aggregate gift tax liability until after the death of the donor. It would result in confusion and uncertainty and defeat the purpose of the Statute of Limitations enacted by Congress.

Argument.

I.

THE GIFTS WERE GIFTS OF PRESENT INTERESTS.

Under the facts in this case the gifts made by respondent in trust for his minor children vested immediately in enjoyment to the fullest extent possible and were, therefore, gifts of present interests.

A. Gifts Under Deed of Trust Dated December 17, 1936.

On December 17, 1936, respondent created a deed of trust for the benefit of his five children, three of whom were minors. The initial gift to the trustees was $64,975.83. In 1937 respondent added $25,000 to this trust. The Commissioner has never questioned the present nature of the gifts with respect to adult beneficiaries.

The treatment of adult and minor beneficiaries is identical except with regard to the direction to accumulate the income of shares of minors in Paragraph 3 and the mandate in Paragraph 6 (a later expression of the settlor's intent) to apply the income of minors' shares for education, comfort and support of the respective minors.

Section Second, Paragraph 6 provides:

> "6. *Trustees shall hold the shares of minors* in whom the principal shall have vested during their respective minorities, and during such time *shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors,* and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. *The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. . . .*" (Italics added.)

In this section the respondent has in the clearest possible language directed the trustees to use the income for

the education, comfort and support of the minor beneficiaries. The direction to accumulate any income not needed for support, maintenance and education was not intended to lessen the gift to the minor beneficiaries or place adult beneficiaries in a superior position. Actually it is without significance because it merely incorporates into the deed of trust the duty imposed by law upon all who are entrusted with property belonging to a minor.

Under the terms of the trust the obligation of the trustees was to immediately apply the income of the trust to the extent available for the support and education of the minor beneficiaries in a manner becoming their station in life.

The petitioner takes the position that there is no distinction between (1) a positive direction to support and educate and (2) uncontrolled discretion in the trustee as to whether the income shall be applied for support and education. In this we believe the petitioner is in error.

The distinction with respect to instructions by the settlor to the trustee is stated by the American Law Institute Restatement of Trusts, Section 187, as follows:

> "If the trustee is empowered to apply so much of the trust property as he may deem necessary for the support of the beneficiary and the trustee does not apply at least the minimum amount which could reasonably be considered necessary for the beneficiary's support, *the court will compel the trustee to pay the beneficiary at least that minimum amount.*" (p. 487; italics added.)

> "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are

> not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act." (pp. 488-489)

To the same effect, see also Scott on Trusts, Section 187.

A fortiori, the court will compel distribution where, as here, there is no discretion and the trustee is under an absolute duty to distribute the income for the support and education of the minors.

The petitioner further assumes that the trustees in this case were under no duty to apply the income "for the education, comfort and support" of the minors unless the minors were not supported from other sources. Thus on page 16 of petitioner's brief it is stated that "it is fortuitous, so far as the trust instruments are concerned, whether the income from the trusts will be used for such purpose." This assumption we also believe is erroneous. As stated in the American Law Institute Restatement of Trusts, Section 128, Comment "e":

> "It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. *The inference is that he is so entitled.*" (p. 327; italics added.)

Scott on Trusts, Section 128.4, contains the following statement:

> "Where the trustee is *directed* to pay to the beneficiary or to apply for him so much as is necessary for his maintenance or support, *the inference is that the settlor intended that he should receive his support from*

the trust estate, even though he might have other resources."

See also: *Walter's Case*, 278 Pa. 421, 123 Atl. 408 (1924);
Hill v. Clark, 74 Pa. Super. 181 (1920);
Grady's Estate, 34 Pa. D. & C. 143, 146 (1938).

In the present case it was the trustees' duty to apply the entire net income of each minor's trust for his or her support regardless of the other resources of the minor, and this duty would continue until the income of a minor's trust became greater than the minimum amount which could reasonably be considered necessary for such support and education in the manner becoming his position in life. Obviously, the income of the trusts for each of the minors was below the minimum amount needed for a minor's support, averaging as each trust did less than $400 a year during the years 1936, 1937 and 1938 (R. 36).

The trustees complied with their duty and paid out the income for the support of the minors until the middle of 1937, when distribution checks sent to the minors' mother were returned by her. The fact that the minors' mother thus apparently indicated her desire not to receive payments for the minors' support can in no way affect the duty of the trustees or the character of the gifts. It is also submitted that an actual breach of duty by the trustees could not change the original character of the gift.

The petitioner argues that the gift was not a gift of a present interest because the settlor could not predict what the need would be. No one can accurately predict what it will cost to support and educate a minor. It is self-evident, however, that the settlor knew the cost would exceed the income from the trusts created. Owing to the fact that the settlor contemplated adding to the trust, it was proper for him to provide for the *possibility* that at some time in the future the income might be more than was necessary for the support of the minors. No one, however, could

possibly contend that the income of the trusts as they existed in 1937 and 1938 was more than the minimum required for the reasonable education and support of the minors.

The present situation is closely analogous to one where outright gifts are made to minors. In such event, owing to the disability of the minors, guardians would be appointed for them and the income would be expended for their benefit insofar as necessary for their education and support and the balance accumulated and paid to them upon reaching twenty-one years of age. It is submitted that the interests of the minors in this case are even more clearly a present interest than they would be if the gifts had been made direct to the minors because here the minors immediately possess the fullest enjoyment of the gifts. The reason for this is that in the instant situation the trustees are under a positive direction of the settlor to use income for the minors' support and there is no barrier to the minors' enjoyment, whereas a guardian should first obtain court approval for such action. Under Pennsylvania law when a guardian is going to spend money for the support and maintenance of his ward, the proper procedure is to obtain a court order directing the expenditures: Act of June 7, 1917, P. L. 447, § 59 (i), 20 P. S. 1042. Failure of the guardian to obtain such a court order shifts the burden of justifying the necessity as well as the reasonableness of the expenditures: In re *Henry's Estate,* 341 Pa. 439, 19 A. (2d) 66 (1941). A trustee acting under a positive direction *must* act without prior court approval and the burden is upon any exceptant to prove that there was no necessity and that the expenditures were unreasonable. A guardian who has obtained court approval and a trustee, where the trust contains such a positive direction as here, are both under a duty to make payments for the necessary support, maintenance and education of the minor. Discretion must be exercised in some manner when any payment is made for the benefit of a minor. The decisive factor is the ex-

istence of the duty to make the payments; it is irrelevant that the payments are to be made in one situation by a guardian and in another by a trustee.

Had the respondent made such outright gifts to his minor children, no one would seriously contend that they were not gifts of present interests, though in that case, as in this, only so much of the income would have been used for their benefit as was necessary and the balance would have been accumulated for them until they became of age. Exactly the same principle should apply to the present case. It is immaterial that the result was achieved through the medium of a trust instead of by outright gifts to the minors. So, also, the same result would have been reached had the deed of trust made exactly the same provision for the minors as it did for the beneficiaries who were of age, i. e., without any reference to accumulating the income. In such case the trustees being directed to distribute the income quarterly to the minors would have been required, because of their disability, to use so much as might be necessary for their support and to accumulate the balance. In such case petitioner would have been forced to admit that the gifts were of present interests, unless he is prepared to go to the extreme of asserting that no gifts of present interests can be made to minors. Such a contention obviously could not be sustained.

The case of *Fondren v. Commissioner*, U. S. , 65 S. Ct. (Adv.) 499, decided by this Court on January 29, 1945, presents a factual situation where the settlor directed that the income be accumulated for the minors, but gave the trustee power in his sole discretion to use it for the minor's education and support. In that case the intent of the settlor, that the income be accumulated unless no other funds were available for the support and education of the minors, was explicitly stated in the deed of trust. In the instant situation there is nothing, *implicit or otherwise*, to indicate such an intent on the part of the settlor. On the contrary the clearly expressed intent of the settlor

is that the income be used immediately for the support and maintenance of the minors.

At page 22 of his brief the petitioner recognizes that "the nature of the interest of the beneficiaries is determined as of the date of the gift, not by what the trustee may subsequently choose to do in the exercise of the powers given to him. *Commissioner v. Gardner*, 127 F. 2d 929, 931 (C. C. A. 7th); *Commissioner v. Brandegee*, 123 F. 2d 58, 61 (C. C. A. 1st)." However, the petitioner in an effort to put the instant situation on all fours with the *Fondren Case* emphasizes the circumstances *dehors* the trust and minimizes the language and expressions of the intention of the settlor in the trust.

It is submitted that the differences of fact between this case and the *Fondren Case* are significant and call for a difference in result. The *Fondren* trusts call for accumulation and provide for distribution only if absolutely necessary. In contrast to this the present trust compels the immediate distribution of the income for support and maintenance of the minors and provides for the possibility of accumulation. In the *Fondren Case* the period of accumulation extended beyond minority whereas in the instant situation the possibility of accumulation ends with the end of the period of legal disability. There is nothing in the present case to indicate a principal concern for a period of adult life. No contingency stands in the way of the minors receiving the income from the trusts.

The situation here presented is precisely the situation referred to by this Court in the *Fondren* decision:

> "Whenever provision is made for immediate application of the fund for such a purpose (minor's benefit), whether of income or of corpus, the exemption applies." (p. 505; parenthesis added.)

While the decision of the court below went farther than the present deed of trust requires, nevertheless the court correctly interpreted the language of the present deed:

"The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard . . . *The use and enjoyment of the gifts were the minor's from the day the gifts were made.*" (R. 50; italics added.)

Petitioner implies that the court below in the case of *Wisotzkey v. Commissioner*; 144 F. (2d) 632 (C. C. A. 3rd, 1945), changed its position with respect to the nature of the gift in the instant situation. Again we believe this is an error. The court below distinguished the instant factual situation. Footnote 1 on page 13 of petitioner's brief likewise distinguishes the *Wisotzkey Case* from the present case.

In the *Wisotzkey Case* accumulation was mandatory and income so accumulated became corpus. In the present case distribution for the support and education of the minors is mandatory. Unless the corpus is hereafter increased there is no possibility of accumulation under the terms of the trust.

In an attempt to strengthen his position, petitioner in his brief (p. 19) emphasizes that Congress was in search of a workable rule and, in addition, cites discussion from the Congressional Record (p. 20). It is quite clear that Congress retained the annual exclusion to avoid administrative difficulties. The petitioner, however, now seeks to press the legislation beyond the point which Congress in the exercise of its judgment believed to be feasible. Petitioner quite obviously feels that the annual exclusion should be abolished and is attempting to do so in the instant situation because property of minors requires slightly different treatment. It is this desire on the part of petitioner to narrow the annual exclusion to the point of elimination, if

possible, which is responsible for subjecting "to litigation every gift made to a trust like the one here involved." (Petitioner's brief, p. 20.)

Under the law it is perfectly proper for a donor to make annual outright gifts to the same donees to take full advantage of the annual exclusion. It is no less proper for donors "to make gifts of less than $5,000 from year to year to the same trusts and the same donees to derive the full advantage of the annual exclusion." (Petitioner's brief, p. 20.) The only requirement is that the beneficiaries be able to immediately enjoy the gift. The present deed fulfills this requirement. Mr. Justice Holmes made the following pertinent observation:

> "The fact that it (the taxpayer) desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." Superior Oil Co. v. Mississippi ex rel. Knox, 280 U. S. 390 at 395, 396 (1930).

The petitioner raises the question of the gift of the principal for the first time in his brief filed with this Court. It seems clear to us that the entire interest in the gift belonged to the minor beneficiaries. No third party had any interest in or to the gift. The entire income and enjoyment of the gift vested immediately in the minor beneficiaries and will remain there until the principal is distributed. At age 45 the beneficiaries will receive one-half of the principal. They have a power of appointment with respect to the remaining half. It is only by means of the donees that anyone could obtain any interest whatsoever in the gift. The trust provides for the distribution of the entire accumulation, if any, as a part of the minors' estates in the event of the death of one of the donees during minority. We submit that the gift of the principal is also a gift of a present interest. The same conclusion is reached if we consider the accepted definitions of present interests. The

American Law Institute's Restatement of Property, Section 153, Paragraph 3 provides:

"(3) A present interest is an interest in land or in a thing other than land, which includes

(a) either a right to the immediate beneficial enjoyment of the affected thing;

(b) or, if the affected thing is the subject matter of a trust,

(i) either the right to the immediate beneficial enjoyment of the proceeds of the trust;

(ii) or the right of the trustee forthwith to have the control and management of the affected thing pursuant to the provisions of the trust."

The gifts to the minors did not in this respect differ in any way from the gifts to the adult children in which case the Commissioner has conceded the settlor to be entitled to the specific exclusions.

The attempt on the part of the petitioner to have the principal of the trust declared a gift of a future interest even though the beneficiary is entitled to the immediate use and enjoyment of the entire income and the principal is no more than necessary to insure continued payment of the necessary funds, and even though the settlor has parted completely with his entire interest in the property, is merely another attempt of the petitioner to whittle away the exclusion granted by Congress. Such a policy can lead to nothing but administrative difficulties. It is submitted that Congress did not intend that such a procedure be followed with respect to gifts in trust.

We submit that the gift vested immediately in enjoyment in the minor beneficiaries to the fullest extent and that for this reason it is a gift of a present interest.

B. Gifts Under Deed of Trust Dated December 9, 1938.

The terms of the deed of trust of December 9, 1938, are substantially identical with those of the deed of December 17, 1936, so far as the interests given are concerned. As the corpus of the trust is real estate instead of securities, wide powers are given to the trustees to develop and improve the property (Section Fourth, Paragraph 2). The trustees are donor's three children then of age, the two minor children to become trustees as they come of age. (Section Seventh.)

The same considerations therefore apply to the gifts made in 1938 by this deed of trust as to those made in 1936 and 1937 under the 1936 deed.

II.

THE STATUTE OF LIMITATIONS.

Petitioner, having determined that the gifts for the minor children in 1936 were gifts of present interests, should not be permitted, after the Statute of Limitations has run, to reverse this determination so as to increase the gift taxes for subsequent years.

Even if the gifts were gifts of future interests petitioner should not be permitted, after the statutory period has run, to reverse his determination that they are gifts of present interests and thus increase the taxes for subsequent years.

It is admitted that the Statute of Limitations has run as to the calendar year 1936 and that petitioner is prohibited by law from assessing any tax with respect to that year at this time. Petitioner, however, in computing the deficiencies here in dispute, has reopened the respondent's 1936 return and redetermined the net gifts for that year with the result that respondent's gift taxes for the years 1937 and 1938 have been increased. By thus increasing respondent's taxes for 1937 and 1938 by adjusting transactions which occurred in 1936, petitioner has done indirectly

what he is forbidden by statute to do directly. If petitioner's interpretation is proper, it will be impossible for a donor or for the government to know until after the donor's death the amount of his aggregate gift tax liability. Under this interpretation, if respondent shall make a gift ten years from now, it will be possible for either respondent or petitioner to again reopen respondent's 1936 gift tax return and, for example, place a different value on the property which was given away in that year. This, of course, might benefit either respondent or petitioner, but such interpretation of the statute can result in nothing but confusion and uncertainty. Finality is the end which Congress sought to attain in providing Statutes of Limitations. The interpretation placed upon these provisions by petitioner nullifies the intent of Congress. The Tax Court decided this issue against respondent, following its previous decision in *Lillian Seeligson Winterbotham*, 46 B. T. A. 972. It is contended that this case should be overruled.

CONCLUSION.

For the foregoing reasons the decision of the court below to the effect that the gifts to the minors under both deeds of trust were gifts of present interests should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* William D. Disston.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 4, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case, like *Fondren* v. *Commissioner*, 324 U. S. —, presents questions whether certain gifts to minors are gifts of "future interests in property," within the meaning of the Revenue Act of 1932, c. 209, 47 Stat. 169.

In 1936 the respondent, William D. Disston, created a trust for the benefit of each of his five children, three of whom were then minors. The total of his gifts that year was $71,952. The Commissioner allowed an exemption of $5000 on each gift for the children and on one to his wife. The taxpayer also was allowed the specific exemption of $40,000 provided by § 505 of the Revenue Act of 1932, as amended by § 301(b) of the Revenue Act of 1935. The net gifts for 1936 accordingly were computed to be $1952, upon which a tax was assessed and paid.

In 1937 the taxpayer added to the corpus of the trust securities valued at $25,000, of which $5000 was allocated to each child's interest, including the three who were still minors. In 1938 he created another trust for his five children, the corpus consisting of undeveloped land worth $38,581. Two of the children still were minors.

The two trusts were identical in all respects now material. The principal was divided into five equal shares, one for each child. The trusts were of the spendthrift variety. All shares of the corpus and income were to be free from "anticipation, assignment, pledge, or obligations of beneficiaries," as well as execution or attachment. The shares of the minors alone are now involved. Hence the nature of the trust as applicable to them only need be considered.

The taxpayer's son, William L. Disston, was nineteen in 1936 when the first trust was created. As to his share the trustees were directed, in the Second Article, "to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants . . . in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes," with provision for division among the taxpayer's other children and their descendants if no descendant of the beneficiary should then be living. The Article contains a proviso that if the taxpayer's son should die before reaching forty-five, the son may appoint to his spouse for a period no longer than her life not more than one-half of the income from his share of the corpus.

Identical provisions were made for the two minor daughters, except that they were to obtain only one-third of the corpus at age forty-five and could appoint to their spouses only one-third of the income.

A subsequent paragraph provided that the trustees should hold the minors' shares during their respective minorities, "and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors."

In addition the Fourth Article, which defined the trustees' powers, authorized them "[t]o apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she by reason of age,

illness, or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor . . . shall be sufficient acquittance and discharge to the Trustees for such payment or payments."

Finally, the trustees were authorized to invade the corpus in an emergency: "To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as Trustees may consider to be for the best interests of such beneficiaries during illness or emergency of any kind; provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten percent (10%) of the value of such share of principal. . . ."

In operation the 1938 trust of unimproved realty had produced no net income to the time the case came before the Tax Court. Most of the 1936 income of the first trust, $288 for each minor, was paid to the mother of the beneficiaries. In 1937 partial payments of income, $94 per minor child, were made. The beneficiaries' mother returned other checks to the corporate trustee in 1937, and one of the individual trustees, an adult child of the taxpayer, directed the corporate trustee thereafter to accumulate the income of the minors. No further payments of income were made to any child prior to his becoming of age.

In determining the taxpayer's gift tax for 1937 the Commissioner disallowed three $5000 exclusions from the net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests. For 1938 the Commissioner disallowed two $5000 exclusions on the ground that the gifts made that year to the two children who were still minors were gifts of future interests.

In computing the gift tax for 1937 and 1938 it was necessary for the Commissioner to compute the aggregate sum of the net gifts for the preceding years.[1] The Commissioner, in determining

[1] The formula results in a progressive rate of gift taxation, not limited to progression within the calendar year, but extending over the life of the donor. The computation formula is set forth in § 502 of the Revenue Act of 1932:

"The tax for each calendar year shall be an amount equal to the excess of—

"(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

"(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the next gifts for each of the preceding calendar years."

the net gifts made for this purpose by the 1936 trust, adjusted the exclusions which he had allowed in 1936 to the extent of $5000 for each of the three minors. The period of limitations for assessment and collection of 1936 gift taxes had run.[2]

The Tax Court upheld the Commissioner, but the Court of Appeals reversed, holding no future interests arose as a result of the gifts to the minors. Consequently it was unnecessary for the Court of Appeals to consider whether the statute of limitations barred readjustment of the net gift figure for 1936 or simply barred collection of any further gift taxes for that year.

The guiding principles were outlined recently in *Fondren* v. *Commissioner*, 324 U. S. —. Gifts of "future interests," within the meaning of § 504(b), to any person are not excluded from the computation of net gifts to the extent of the first $5000 in value, as are present interests. Treasury Regulation 79 (1936 ed.), Article 11, defines "future interests" as interests "limited to commence in use, possession, or enjoyment at some future date or time. . . ." The definition has been approved repeatedly. Cf. *Ryerson* v. *United States*, 312 U. S. 405; *United States* v. *Pelzer*, 312 U. S. 399; *Fondren* v. *Commissioner*, 324 U. S. —.

Clearly the corpus of the trusts falls within the definition. Distribution to William L. Disston, for example, has no relation to his reaching his majority, which he has now attained. He must live to attain the age of forty-five to enable him to receive one-half of the corpus. If he does not reach that age, his estate receives no part of the principal. The recipients are an undetermined group designated in the trust provision, among whom the beneficiary has a limited power of appointment. At the time of the gifts in 1936-1938 it was unknown who in fact would receive this one-half interest. Obviously the enjoyment was postponed.

As to the other half in William L. Disston's share, it likewise was unknown who would enjoy the corpus. One thing only was known, that the named child could not enjoy it. He would continue to receive the income from it for his life, but the principal was not given to him. The possibility that in an emergency the trustees might invade the corpus to the extent of ten per cent for his benefit did not confer a present interest in that part of the principal. The emergency by definition was extraordinary, something that might or might not occur at some indefinite future time.

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[2] See § 517(a) of the Revenue Act of 1932.

No present, certain and continuous enjoyment was contemplated, nor did it materialize. What has been said of the one minor is true of the others.

The question must be determined whether the trusts provided for a present interest in the trust income, or some definable portion of it. The first direction of each trust is to accumulate the net income until the minor reaches twenty-one. If that were all, it would again be clear that a future interest was created by the postponement of enjoyment. A later paragraph directs the trustees, however, "to apply . . . such income therefrom as may be necessary for the education, comfort and support of the respective minors" and to accumulate the remainder.

Respondent urges that this case differs from the *Fondren* case in that there the trust instrument showed that it was not contemplated that the income would be needed for education and support; and the trustee was directed to accumulate the income unless no other funds were available for such purposes, whereas here there is nothing in the trust instrument to indicate such an intent. In fact, respondent argues, the trust instrument means that the trustees *must* apply an amount of the income sufficient to provide for education, comfort and support, even though the minor is amply cared for by his parents, his own efforts, or other sources of revenue, citing 1 Scott, Trusts, § 128.4 and other authorities. When faced with the fact that the history of the trust's administration shows a practical construction by the trustees that support money need not automatically be paid over, respondent urges that the terms of the trust and the nature of the interest granted cannot be varied by what was subsequently done in administration.

The language of the trust instruments directs that the income be accumulated during minority. The subsequent provision for payments for maintenance and support may be said to indicate a departure from the policy of accumulation only when necessary, in the reasonable discretion of the trustees. If that is the appropriate interpretation of the trust instruments, then little difference from the *Fondren* case is involved. Even in its practical working, the trustees did not find the necessary prerequisites for a steady application of all or any ascertainable part of the income for education, support and maintenance.

But, even though the trustees were under a duty to apply the income for support, irrespective of outside sources of revenue,

there is always the question how much, if any, of the income can actually be applied for the permitted purposes. The existence of a duty so to apply the income gives no clue to the amount that will be needed for that purpose, or the requirements for maintenance, education and support that were foreseeable at the time the gifts were made. In the absence of some indication from the face of the trust or surrounding circumstances that a steady flow of some ascertainable portion of income to the minor would be required, there is no basis for a conclusion that there is a gift of anything other than for the future. The taxpayer claiming the exclusion must assume the burden of showing that the value of what he claims is other than a future interest. Cf. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. That burden has not been satisfied in this case.

The question remains whether the adjustment of net gifts for 1936 in computing 1937 and 1938 tax liability is barred by the statute of limitations. As has been noted, § 502 requires utilization of "the aggregate sum of the net gifts for each of the preceding calendar years" in the formula for computing gift tax liability. Section 517(a) does not purport to bar adjustment of the net gift figure for that purpose, but simply prevents assessment and collection of a tax for a year barred by the statute. The statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining gift tax liability for years which are still open. The Tax Court and Treasury Regulations have construed § 517(a) as requiring determination of the true and correct aggregate of net gifts for previous years.[3] The construction is in accord with the statutory language.

Accordingly, the judgment is

Reversed.

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[3] The pertinent Treasury Regulations 79, Article 5 provides: " . . . By the words 'aggregate sum of the net gifts for each of the preceding calendar years' (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. . . ." See also Winterbotham v. Commissioner, 46 B. T. A. 972; Wallerstein v. Commissioner, 2 T. C. 542; Roberts v. Commissioner, 2 T. C. 679.